IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

THURSDAY, THE 12TH APRIL 2007 / 22ND CHAITHRA 1929

SA.No. 679 of 1993()

AS.20/1993 of SUB COURT.,THALASSERY
OS.478/1989 of MUNSIFF COURT, KANNUR
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APPELLANTS:RESPONDENTS/PLAINTIFF/DEFENDANTS 3 TO 6
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1. ARAYAKKI NABEESA, D/O.KADEESUMMA
   AGED 54 YEARS, RESIDING AT CHIRAKKAL AMSOM
   PUZHATHI DESOM, KANNUR.
2. -DO- ABDUL RASHEED, S/O.FATHIMA
   AGED 44 YEARS, RESIDING -DO-
3. ARYAKKI ISMAIL, S/O.MOIDEEN HAJI
   AGED 28 YEARS, RESIDING -DO-
4.. -DO- SULAIKA, D/O.MOIDEEN HAJI
   AGED 26 YEARS, RESIDING -DO-
5. -DO- HARIS, S/O.MOIDEEN HAJI
   AGED 22YEARS, RESIDING -DO-

BY ADV. SRI.T.A.RAMADASAN,JIMMY JOHN

RESPONDENT:APPELLANT/1ST DEFENDANT

ARAYAKKI SAINABA, D/O.AYISUMMA
AGED 64 YEARS, NO OCCUPATION,
RESIDING AT CHIRAKKAL AMSOM, PUZHATHI AMSOM
KANNUR.

BY ADV. SRI.V.RAMKUMAR NAMBIAR

THIS SECOND APPEAL HAVING BEEN FINALLY HEARD ON 12/04/2007,THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

ORDER ON C.M.P.NO.1874/1993 IN S.A.NO.679/1993

12.4.07 DISMISSED SD/- M.Sasidharan Nambiar
Judge

/true copy/

P.S. To Judge

M.SASIDHARAN NAMBIAR,J.

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S.A. NO.679 OF 1993

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Dated this the 12th day of April 2007

JUDGMENT

Plaintiff and defendants 3 to 6 in O.S.478/1989 on the file of Munsiff Court, Kannur are the appellants. First defendant is the respondent. Suit was filed seeking partition of the plaint schedule property. Plaint schedule property admittedly originally belonged to Ammad. Under Ext.B2(registered marupattam) Kadeesumma, Moideen and Amina obtained the property. First appellant and deceased Pathumma are the children of Kadeesumma. On the death of Pathumma, her rights devolved on appellants 2 to 5 and deceased second defendant. Amina had three children, Abdulla, Moosan and Ayisumma. Moideen admittedly assigned his right over the plaint schedule property under Ext.B1 in favour of Ayisumma and her daughter respondent. Moosan, the son of Amina released his right over the 1/3rd right of Amina, in favour of

Abdulla under Ext.B4. Abdulla thereafter released his rights in favour of Ayisumma and respondent under Ext.B3. Ayisumma thereafter admittedly released all her rights in favour of respondent. First appellant instituted the suit contending that on the death of Kadeesumma her daughters first appellant and Pathumma and subsequently children of Pathumma and first appellant are in joint possession of the plaint schedule property along with Ayisumma, Moideen and respondent and first appellant is entitled to get her share separated. Defendants 2 to 6 did not file a written statement, though they appeared through a counsel and evidently gone with the first appellant by filing this appeal.

2. Respondent in her statement contended that Kadeesumma had orally surrendered her right in favour of Moideen much before Ext.B1 release deed and under Ext.B1 Moideen had transferred not only his independent share but also the share of Kadeesumma got released earlier and therefore

first appellant or defendants 2 to 6 are not entitled to any share. It was also contended that even if appellants have any right, it has been lost by ouster, adverse possession and limitation. Learned Munsiff upholding the case of plaintiffs granted a preliminary decree directing division of the plaint schedule property. It was challenged before District Court, Thalassery in A.S.218/1990 by respondent. Learned District Judge on reappreciation of evidence found that Ext.B1 assignment deed executed by Moideen and Ext.B3 release deed executed by Abdulla, who was examined as PW2 on the side of the plaintiff establish an open assertion of exclusive right by respondent. It was also found that under Ext.B5 notice sent by Abdulla and Moosan demanding partition and under Ext.B6 reply sent by respondent the rights of others were denied and subsequently Ext.B7 notice sent by Pathumma and first appellant demanding partition and Ext.B8 reply sent to it denying the right amount to open

assertion of hostile title. Learned District Judge thus found that Ext.B5 to B9 establish an open assertion of hostile title. The contention of appellants was that Ext.B8 reply was sent only to Pathumma, and so it will not operate against first appellant. It was also rejected by the learned District Judge holding that Ext.B7 notice was sent by Pathumma jointly with first appellant and hence Ext.B8 reply would operate against first appellant also. But finding that Exts.B6 and B8 reply notices are only unsigned copies of the reply sent by Advocate Karunakaran Nambiar, which were not proved, first appellate court remanded the suit back to the trial court for fresh disposal granting opportunity to prove Ext.B5 to B9. Thereafter Adv. Karunakaran Nambiar was examined as DW1. Learned Munsiff on the evidence found that rights of appellants is not barred by ouster, adverse possession and limitation and decreed the suit finding that respondent was asserting her own title and there was no animus to possess the property

against appellants. It was challenged before Sub Court, Thalassery in A.S.20/1993.

3. The learned Sub Judge, on re-appreciation of evidence, found that under Ext.B5 notice issued by the executant of Ext.B4 release deed claimed partition and under Ext.B6 reply respondent contended that the property belongs to her absolutely and is not available for partition and thereafter Ext.B7 registered notice was sent by first appellant and her sister Pathumma claiming partition for which Ext.B8 reply was sent whereunder also it was made clear that Khadeesumma had orally surrendered her share in favour of Moideen who subsequently assigned it in favour of respondent and her mother and mother released her right and respondent is possessing the property as her own and first appellant and Pathumma are not entitled to get any share and Ext.B6 and B8 are proved to be the copies of the registered reply notices sent through DW1, the Advocate and Ext.B9 postal acknowledgment establish that original of

Ext.B8 was served on Pathumma on 17.10.1967 and Ext.B7 notice was sent by Pathumma for the first appellant also and Ext.B7 and B8 operate as ouster and therefore from 17.10.1967 possession of respondent is not for and on behalf of the appellants and therefore their right has been barred by adverse possession and they are not entitled to get a decree for partition as granted by the trial court. The appeal was allowed and the suit was dismissed. The second appeal was filed challenging the decree and judgment passed by the first appellate court.

4. The first appeal was admitted formulating the following substantial questions of law.

i) Whether the claim for adverse possession while claiming to be in possession of the property as owner is sustainable?

ii)Whether Ext.B5 and B7 notices demanding partition and Ext.B6 and B8 reply notices tantamount to ouster and whether on that basis respondent is entitled to contend that title of the

plaintiff and defendants 2 to 6 is barred by adverse possession and limitation?

5. Learned counsel appearing for appellants and first respondent were heard.

6. Admittedly plaint schedule property originally belonged to Ahmed in jenmom right. Under Ext.B2 Marupat of 1927, Khadeesumma, Moideen and Amina obtained the property. Under Ext.B1, Moideen assigned his right in favour of Ayisumma and her daughter, respondent. The said Ayisumma, Moosan and Abdulla are the chidlren of Amina. Moosan, under Ext.B4 released his right in favour of his brother Abdulla and under Ext.B3, Abdulla released his right including the right obtained under Ext.B4, in favour of Ayisumma and respondent. Ayisumma admittedly released her right over the property subsequently in favour of respondent, her daughter. Appellants are claiming one-third share originally due to Khadeesumma. First appellant, being the daughter and other appellants being the children of Pathumma, the sister of first appellant, are

claiming that plaint schedule property is in joint possession with other co-owners and it is available for partition and one-sixth share is to be alloted to first appellant and one-sixth share is due to other appellants. Respondent contended that Khadeesumma had orally surrendered her one-third share in favour of Moideen and under Ext.B1 that share was also assigned in favour of respondent and her mother and therefore appellants have no right over the plaint schedule property. The case of oral surrender was negatived by the trial court and first appellate court. When the original judgment of the trial court was challenged before District Court in A.S.218 of 1990, learned District Judge held that the oral surrender alleged by Moideen was not established. That finding has become final. Though the suit was remanded to consider the question of ouster and adverse possession, the findings of learned District Judge were not challenged by filing an appeal. Therefore the findings of learned District Judge is not open

to be challenged by either the appellants or respondent.

7. Therefore the only question to be decided is whether rights of appellants as legal heirs of Khadeesumma to claim a share in the plaint schedule property is barred by ouster, adverse possession and limitation. In law a co-owner in possession of the property is presumed to be in possession of the property for the non-possessing co-owner also. In order to defeat the right of the non-possessing co-owner, the co-owner in possession of the property who sets up title by adverse possession, has to prove that there was a hostile, open assertion of the right and denial of the rights of the non-possessing co-owner to the knowledge of the non-possessing co-owner and that too in repudiation of the rights of the non-possessing co-owner amounting to ouster. Though learned Munsiff on appreciation of evidence found that there is no evidence to prove that the respondent was possessing the property with the animus to possess

it against appellants and respondent was claiming to be in possession of the property as owner of the property and so in the absence of animus to possess it with a hostile title against appellants, plea of bar by adverse possession is not sustainable. First appellate court, on re-appreciation of evidence differed with the said finding. Relying on Ext.B5 and B7 notice, demanding partition, for which Ext.B6 and B8 reply notices were sent, First appellate court found that it would amount to open assertion of hostile title to the knowledge of the appellants who are admittedly not in possession of the property for the requisite period and therefore their right is barred by ouster, adverse possession and limitation. The argument of the learned counsel appearing for appellants was that as the case of respondent was only that she was possessing the property as the absolute owner on her own title and that too on the basis of an oral surrender of the fractional share of Khadeesumma, which was disbelieved by the courts below, she is

not entitled to contend that she was possessing it adverse to the appellants and therefore the findings of the first appellate is not correct. Relying on the decision of the Apex Court in **Annsaheb Bapusaheb Patil. Balwant Babusaheb Patil (AIR 1995 SC 895)** it was argued that as first defendant was asserting possession under her own lawful title, she is not entitled to prescribe adverse possession against appellants and therefore the finding of first appellate court is not sustainable. Learned counsel also argued that in any event the sending of Ext.B5 or B7 notices or Ext.B6 and B8 replies will not tantamount to ouster and the finding of first appellate court is not sustainable. Reliance was placed on the decision of the Apex Court in **Govindammal V. R.Perumal Chettiar and others(JT 2006(10)SC 121).** Learned counsel appearing for respondent argued that facts of the present case are entirely different. It was pointed out that respondent is a

co-owner and when Ext.B5 was sent by Moosan and Abdulla under Ext.B6 reply respondent specifically contended that she is not possessing the property on behalf of others and instead is possessing the property as her own, Ext.B7 notice was sent by first appellant and Pathumma thereafter claiming partition for which also Ext.B8 reply was sent and as evidenced by Ext.B9, original of Ext.B8 was served on Pathumma who sent Ext.B7 notice on behalf of first appellant also and from the date of receipt of that notice, possession of the respondent can only be on her own behalf and it is an open assertion of her hostile title which was correctly found by the court below as ouster and as the said notice was served on Pathumma on 17.10.1967 and the suit was filed only in 1989 it is clearly barred by adverse possession.

8. Learned District Judge in A.S.218 of 1990, while considering the first appeal challenging the original decree granted by the trial court, considered the question of ouster and adverse

possession. At that time, though Exts.B5 to B9 were produced, DW1 was not examined and Exts.B6 and B8 unsigned copies of the reply notices were not proved to be the copies of the reply notice sent by the counsel. But learned District Judge had considered the effect of Ext.B5 to B9 notices. A contention was raised by first appellant who alone was the appellant in the first appeal before learned District Judge that as Ext.B8 reply was sent to Pathumma alone and not to first appellant, in the suit was filed only by first appellant, Ext.B8 cannot operate as ouster as she did not receive the notice. The learned District Judge rightly repelled the contention holding that as evidenced by Ext.B7, the notice was jointly sent by Pathumma and first appellant and as seen from the original notice it was sent, for the first appellant also, by Pathumma to whom Ext.B8 reply was sent. It was therefore held that Ext.B8 reply sent to Pathumma if proved, would operate as against first appellant also. That finding was

also not challenged by appellants. The evidence of DW1 establishes that Ext.B5 and B7 notices were entrusted to the counsel by respondent and her husband with instructions to send the reply as shown in Ext.B6 and B8 and Ext.B6 and B8 are the office copies of the reply notices prepared by DW1 in his own handwriting and their originals were sent. The evidence of DW1 with Ext.A9 establish that original of Ext.B8 was served on Pathumma on 17.10.1967. Therefore from 17.10.1967 knowledge of the contents of Ext.B8 notice has to be imputed on first appellant also. The other appellants being the legal heirs of Pathumma cannot be heard to contend that the contents are not known to Pathumma or that it will not operate against them.

9. Then the question is whether Ext.B5 and B6 together and B7 and B8 together would amount to ouster and open assertion of hostile title with an animus to possess the same adverse to appellants. Before considering that question, the principle has to be borne in mind. The possession of a co-owner

shall always be presumed to be for and on behalf of the non-possessing co-owner also. Possession of the co-ownership property by a co-owner for any number of years by itself will not amount to adverse possession as that possession can only be for and on behalf of the non-possessing co-owner also. But from the moment a possessing co-owner declares that he is possessing the property on his behalf alone with the knowledge of the non-possessing co-owner, then possession of the possessing co-owner from that date onwards cannot be for and on behalf of the non-possessing co-owner also. The question is whether Ext.B7 and B8 would amount to an open assertion of possession by herself, with an animus to possess it against the non-possessing co-owner. Under Ext.B7, Pathumma and first appellant contended that they have one-third share due to Khadeesumma and the respondent is in possession of the property jointly with them and they are entitled to get their share separated. Ext.B8 reply was sent by DW1 for

respondent. In Ext.B8, respondent asserted that she is possessing the property as her own. She has denied the rights of first appellant and Pathumma. True, the basis was that Khadeesumma had orally released her right in favour of Moideen, who in turn, under Ext.B1 assigned that right also to respondent and her mother. It is also true that the oral release was not proved and therefore under Ext.B1 respondent and her mother did not derive the rights of Khadeesumma. But under Ext.B8 reply respondent asserted that she is the absolute owner of the property and first appellant and Pathumma have no right over the property. Therefore from the date of receipt of Ext.B7 reply, viz, 17.10.1967 possession of the property by respondent cannot be for and on behalf of the first appellant or Pathumma. If that be so, as the suit was not filed within 12 years from that date, suit is definitely barred by ouster and adverse possession.

10. Though learned counsel appearing for appellant argued that in view of the law laid down

in **Anna Saheb's** case (supra), when respondent asserted that she is the true owner of the property by virtue of the oral release and subsequent assignment under Ext.B1, as well as the other release deed executed in favour of Ayisumma the mother and thereafter the mother in favour of respondent, she is not entitled to claim that her possession was adverse to the appellants, I cannot agree with the submission. The argument could have been accepted if the position was that respondent did not recognise the right of Khadeesumma or the legal status of appellants as legal heirs of Khadeesumma. On the other hand, respondent recognised the rights of Khadeesumma and contended that Khadeesumma had orally released her fractional share in favour of Moideen, who in turn assigned it under Ext.B1 in favour of respondent and her mother. The fact that the oral release was not proved only means that rights of Khadeesumma was not obtained by respondent and her mother under Ext.B1 assignment deed. But when under Ext.B8,

respondent asserted that she is possessing the property on her own right and not on behalf of appellants or Pathumma and repudiated their rights whatsoever it cannot be said that first respondent cannot prescribe a title by adverse possession as against the legal heirs of Khadeesumma who are co-owners of the property. A co-owner is definitely entitled to plead and prove adverse possession provided there was ouster. The question is whether on the facts and evidence, ouster has been established. As stated earlier, Ext.B7 and B8 would definitely establish that respondent denied the title of appellants and that she is possessing the property on behalf of appellants. It was asserted that she is possessing it on her own right and not for anybody else. Hence at least from the date of receipt of Ext.B8 reply under Ext.B9 postal acknowledgment, there was ouster and adverse possession.

11. The facts of the case considered by the Apex Court in **Govindammal**'s case (supra) are

entirely different. In that case widow of Raju Naidu had sent, Ext.B3 notice in that suit, claiming partition on 2.11.1955. But suit was filed only later in 1979. The facts of the case stated in the judgment does not reveal the contents of reply notice sent by defendants. On the facts of that particular case, Apex Court held that the failure of the widow to institute the suit, when she was thrown out of the matrimonial home, after sending Ext.B3 notice will not amount to ouster or adverse possession. But the facts are different in this case. When Pathumma and first appellant claimed partition contending that they are in joint possession of the property along with respondent, it was denied and it was informed that respondent is not possessing the property on their behalf. Respondent asserted that she is the absolute owner and is possessing the property on her behalf and appellants have no right to the property. It would definitely amount to open assertion of hostile title which would amount to ouster, sufficient

enough to attract adverse possession at least from the date of receipt of Ext.B8 reply notice. In such circumstances, I do not find any reason to interfere with the finding of first appellate court. Appeal is dismissed.

M.SASIDHARAN NAMBIAR,
JUDGE.

tpl/lgk

M.SASIDHARAN NAMBIAR, J.

S.A.NO.679 /1993

JUDGMENT

12TH APRIL,2007